Before the
ILLINOIS COMMERCE COMMISSION

In the Matter of the Petition of SCC Communications Corp. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with SBC Communications Inc.	))))))	Docket No. 00-0769

AMERITECH ILLINOIS' MOTION
TO DISMISS PETITION FOR ARBITRATION

Illinois Bell Telephone Company ("Ameritech Illinois"), by its attorneys, respectfully moves the Illinois Commerce Commission to dismiss the petition of SCC Communications Corp. ("SCC") for arbitration under section 252(b) of the Telecommunications Act of 1996 ("1996 Act" or "Act").[1]

As this Commission has held, only telecommunications carriers are entitled to arbitration under the 1996 Act, and a petition for arbitration by an entity that is not a telecommunications carrier must be dismissed. (Section I below.) The evidence, including SCC's petition for arbitration ("Petition") and other public documents (for example, an SCC brief that admitted, "SCC is not a telecommunications carrier"), shows that SCC is not a telecommunications carrier. (Section II below).

[1] SCC's petition mistakenly names SBC Communications Inc. as the respondent and as the entity with which SCC seeks an interconnection agreement. The proper respondent is Ameritech Illinois. As the Commission knows, Ameritech Illinois is an incumbent local exchange carrier in Illinois, and SBC Communications Inc. is not. This motion proceeds as if SCC had correctly named Ameritech Illinois as respondent.

There is another reason to dismiss SCC's Petition – a reason that stems from the fact that SCC is not a telecommunications carrier, but that is sufficient in and of itself to require dismissal: As SCC repeatedly acknowledged in its recent application for certification to become a telecommunications carrier in Illinois, SCC does not provide and does not intend to provide telephone exchange service or exchange access in Illinois.[2] That, coupled with the fact that interconnection under the 1996 Act is only "for the transmission and routing of telephone exchange service and exchange access" (47 U.S.C. § 251(c)(2)) – the very things that SCC states it does not and will not provide – means that SCC by definition is not seeking interconnection under the 1996 Act. SCC therefore would not be entitled to arbitration under the 1996 Act even if it were a telecommunications carrier. (Section III below.)

Accordingly, SCC's petition should be dismissed forthwith, in order to spare the Commission and the parties the time and expense of litigating issues that the Commission will have no occasion to resolve. (Section IV below.)

I. A PETITION FOR ARBITRATION UNDER THE 1996 ACT MUST BE DISMISSED IF THE PETITIONER IS NOT A "TELECOMMUNICATIONS CARRIER" AS DEFINED IN THE 1996 ACT.

In Docket 97 AB-001 the Illinois Commerce Commission denied a petition for arbitration under the 1996 Act "on the ground that [the Petitioner] does not meet the threshold requirement that it be a telecommunications carrier under the 1996 Act." *See* Commission Order in 97 AB-001, Exhibit 1 hereto, at 5. That decision, which had been advocated by Staff and recommended by the Hearing Examiner, rested on a limitation in the Act that is as applicable today as it was

[2] This motion cites to certain statements in SCC's recently filed Application for Certificate to Become a Telecommunications Carrier (Docket 00-0606). The motion does *not*, however, rely in any way on the fact that SCC is not certified as a telecommunications carrier in Illinois.

then: The arbitrations that Congress provided for in the Act are available only to "telecommunications carriers," as Congress defined that term in the Act.

It is clear from the face of the 1996 Act that, as this Commission held, the entities to which sections 251 and 252 of the Act apply are "telecommunications carriers." For example:

- The incumbent local exchange carrier's duty to negotiate an interconnection agreement under the Act runs to "[t]he requesting *telecommunications carrier*." 47 U.S.C. § 251(c)(1) (emphasis added).

- The interconnection that the incumbent carrier must provide is "for the facilities and equipment of any requesting *telecommunications carrier*." 47 U.S.C. § 251(c)(2) (emphasis added).

- Unbundled access to network elements must be provided only to "any requesting *telecommunications carrier*." 47 U.S.C. § 251(c)(3) (emphasis added).

This repeated use of the words "telecommunications carrier" must be given meaning. The statute cannot be applied as if Congress said "person" or "entity" instead of "telecommunications carrier." Thus, as the Commission correctly held in 97 AB-001, "it is critical to the arbitration process that [the Petitioner] stand as a telecommunications carrier under the 1996 Act" (Exhibit 1, at 4), and it is a "threshold requirement" of the Act (*id.* at 5) that the Petitioner be a "telecommunications carrier," so that if SCC is not a telecommunications carrier, it is not entitled to arbitration (or anything else) under sections 251 and 252 of the Act, and its Petition must be dismissed.[3]

[3] As the Commission Staff put it in its Response to Ameritech Illinois' Motion to Deny the Petition in 97 AB-001, "If the Commission were to determine that [the Petitioner] is *not* a telecommunications carrier as defined by the Act, then Staff believes, as a matter of law, that [Petitioner] has no rights under Section 251 of the Act and, consequently, would not be eligible for interconnection under Section 251 or arbitration under Section 252 of the Act." *See* Exhibit 2 hereto, at ¶ 7.

II. SCC IS NOT A TELECOMMUNICATIONS CARRIER.

A. The Law: Meaning of "Telecommunications Carrier" in the 1996 Act.

The 1996 Act defines the terms that must be applied to determine whether SCC is a telecommunications carrier. First, section 3(44) of the Act defines "telecommunications carrier":

> Telecommunications carrier.—The term "telecommunications carrier" means any provider of telecommunications services . . . .

Then, section 3(46) defines ""telecommunications service":

> Telecommunications service.—The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public . . . .[4]

Putting these definitions together, SCC would be a "telecommunications carrier" entitled to arbitration under the Act if, and only if, it offered telecommunications for a fee *directly to the public*, or to such classes of users as to be effectively available directly to the public.

As we show in subsection B below, SCC does not offer services directly to the public. Rather, it sells its services to telecommunications carriers. SCC will probably admit this (it has no alternative), but may argue that by selling its services to telecommunications carriers, it offers them to "such classes of users" (*i.e.*, its carrier-customers) as to be "effectively available directly to the public" (*i.e.*, SCC's customers' customers). The Federal Communications Commission, however, has already rejected that argument.

In *AT&T Submarine Systems, Inc.*, 13 F.C.C.R. 21,585 (rel. Oct. 9, 1998) (Exhibit 3 hereto), the FCC was called on to determine whether a company called AT&T-SSI was or was not a telecommunications carrier under the 1996 Act. A party named Vitelco argued that AT&T-

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[4] For the sake of completeness, we note the definition of "telecommunications" in section 3(43) of the Act, though we do not rely on the definition in this pleading: "Telecommunications.—The term 'telecommunications' *means the transmission, between or among points specified by the user, of information of the user's choosing*, without change in the form or content of the information as sent and received."

SSI was a telecommunications carrier, on the theory that "because AT&T-SSI sells . . . to common carriers or consortia of common carriers who sell telecommunications services directly to the public. AT&T-SSI provides a telecommunications service that is 'effectively available directly to the public.'" *Id.* ¶ 5. The FCC rejected Vitelco's argument. The FCC held, "We disagree with Vitelco that the activities of AT&T-SSI's customers are relevant to a determination whether AT&T-SSI is a telecommunications carrier. . . . As the Commission has previously held, the term 'telecommunications carrier' means essentially the same as common carrier. It does not . . . introduce a new concept whereby we must look to the customers' customers to determine the status of a carrier." *Id.* ¶ 6. The United States Court of Appeals for the District of Columbia Circuit affirmed the FCC's decision. *Virgin Islands Tel. Corp. v.* FCC, 193 F.3d 921 (D.C. Cir. 1999).

Thus, once this Commission concludes (as it must) that SCC does not offer its services "directly to the public," it makes no difference if SCC sells its services to others who in turn sell services to the public. As a matter of controlling federal law, SCC is not a telecommunications carrier under the 1996 Act if SCC does not itself provide telecommunications directly to the public.[5]

B. The Facts: SCC Is Not A Telecommunications Carrier.

The factual question, then, is whether SCC is or is not a telecommunications carrier as that term is defined in the 1996 Act. SCC answered that question in a brief it filed on

[5] Given that a company must offer telecommunications directly to the public in order to be a telecommunications carrier under the 1996 Act, one may fairly ask what is the import of the concluding phrase of section 3(46) – "or to such classes of users as to be available directly to the public." The D.C. Circuit answered this question in its decision affirming the FCC's order in the AT&T-SSI case. As the court explained, the concluding phrase in section 3(46) can be read as reflecting a "distinction between serving the entire public and serving only a fraction of the public." 198 F.3d at 926. Thus, to qualify as a telecommunications carrier under the 1996 Act, a company must offer its services directly to the public, even if it thereby serves only a fraction of the public.

February 12, 1999, in the Public Utility Commission of Texas. In that brief (Exhibit 4 hereto), the same SCC Communications Corporation that is the Petitioner here stated:

> § 251(c)(2) of the FTA [federal telecommunications act) does not require SWBT to provide SCC unbundled access . . . because . . . ***SCC is not a telecommunications carrier.***" (Exhibit 4 at 3) (emphasis added).

That admission is dispositive – unless, of course, SCC could show that its business has changed in such a way since February of 1999 that it has now become a telecommunications carrier. SCC cannot make that showing. SCC's Petition in this proceeding reveals that SCC still is not a telecommunications carrier, and SCC's recent public declarations about its business, including declarations SCC made to this Commission just two months ago, confirm that fact.

According to SCC's Petition,

> SCC provides telecommunications services that facilitate, enhance, and advance the provision of emergency services . . . to end users of wireline, wireless, and telematics (*e.g.*, On Star and Automatic Crash Notification) service providers. Specifically, SCC aggregates and transports such traditional and nontraditional emergency call traffic from multiple service providers to appropriate Selective Routing Tandems where such traffic is then transported to the Public Safety Answering Points. ('PSAP'). . . . Aggregating emergency call traffic reduces the number of facilities that must interconnect with the incumbent local exchange carriers' ("ILECs'") Selective Routing Tandems, resulting in a more efficient use of the telecommunications network. Such aggregation also reduces the ILEC's administrative responsibilities: rather than coordinate and interconnect with multiple service providers individually, the ILEC need only coordinate and interconnect with SCC in order to handle the emergency call traffic from multiple service providers. In addition, SCC offers its service provider customers and the interconnecting ILEC assurance that emergency call traffic will be passed to the ILEC's Selective Routing Tandems through redundant, self-healing facilities provided by SCC.
>
> Not only will SCC provide efficient and reliable transport of emergency call traffic, but SCC also offers state-of-the-art database management services through its 9-1-1 SafetyNet[SM] product offering.

(Petition at 3-4.)

That passage makes clear – even if not as succinctly as SCC's statement in Texas that "SCC is not a telecommunications carrier" – that SCC provides services to its "service provider

customers," *not* directly to the public or to such classes of users as to be effectively available directly to the public.[6] Moreover, SCC's descriptions of itself and its business in other public documents confirm that SCC does not provide telecommunications directly to the public. Merely by way of example:

- On its website, SCC repeatedly identifies its customers as "Incumbent Local Exchange Carriers (ILECs), Competitive Local Exchange Carriers (CLECs), Integrated Communications Providers (ICPs) and Wireless Carriers" who can "outsource their 9-1-1 management requirements to us." Exhibit 5, first page.[7] *See also id.*, second page. SCC does not provide its services directly to the public.

- In its September 14, 2000, Application for Certificate to Become a Telecommunications Carrier in Illinois ("Application") (Exhibit 6 hereto), SCC acknowledged, "SCC does not have any end-user telephone subscribers." *Id.* at 8, 9.[8] Rather, "As an agent for incumbent local exchange carriers, competitive local exchange carriers, integrated communications providers, and wireless carriers, SCC provides database management services nationwide." (*Id.* at 3.)

In sum, the law is clear and the facts are clear: The only entities that are entitled to arbitration under the 1996 Act, as this Commission correctly held in Docket 97 AB-001, are telecommunications carriers. SCC is not a telecommunications carrier. It has said in so many words that it is not a telecommunications carrier, and all the evidence shows it is not a telecommunications carrier, as the 1996 Act defines that term, because it does not provide

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[6] Note that in the first quoted sentence, SCC says it facilitates, enhances and advances the provision of emergency services to *end users of wireline, wireless and telematics providers*. Here and elsewhere in its Petition, SCC – having been put on notice during the parties' negotiations that its entitlement to arbitration would be challenged – refers to the benefits its services provide to "end users." Always, though, the end users are the customers of SCC's customers; they are not served directly by SCC, as they would have to be in order for SCC to qualify as a telecommunications carrier.

[7] Exhibit 5 is a set of print-outs from SCC's website at www.scc911.com. Most of the pages in Exhibit 5 are not cited in this motion, but are included in the event that the Hearing Examiners may wish additional information about SCC. Taken as a whole, Exhibit 5 corroborates throughout that SCC is not a telecommunications carrier.

[8] Exhibit 6 includes the Application itself and one of the Appendices to the Application. We have numbered the pages comprising Exhibit 6 for ease of reference.

telecommunications directly to the public. SCC therefore is not entitled to arbitration under the 1996 Act, and its Petition should be dismissed.

III. SCC ALSO IS NOT ENTITLED TO ARBITRATION UNDER THE 1996 BECAUSE IT DOES NOT SEEK INTERCONNECTION UNDER THE 1996 ACT.

There is another reason that SCC's Petition should be denied: SCC claims to be seeking interconnection under the 1996 Act. In reality, however, what SCC is seeking is not interconnection as that term is defined in the 1996 Act.

SCC states (at page 5 of its Petition):

> In order to provide the aforementioned aggregation, transport, and database management services, SCC must interconnect its network with the ILECs that have connections with and provide 9-1-1 services to the PSAPs. Thus, *pursuant to the Act, SCC seeks to interconnect its network with SBC's network* at every SBC Selective Routing Tandem in SBC's operating territories. *SCC seeks to interconnect with SBC's Selective Routing Tandems*, just as other competitive carriers do to provide their end users with emergency services. In addition, *SCC seeks to interconnect its ALI nodes with SBC's ALI nodes* (*i.e.*, ALI Steering or Dynamic ALI Updates) so that PSAPs can access location information of the end users of wireless and telematics service providers where such information resides in SCC's ALI nodes. (Emphasis added.)

Thus, SCC claims to be seeking interconnection under the 1996 Act. Under the 1996 Act, however, interconnection is, by definition, "for the transmission and routing of *telephone exchange service* and *exchange access*." 47 U.S.C. § 251(c)(2)(A) (emphasis added). SCC does not provide – and has no intention to provide – telephone exchange service or exchange access. In the Texas brief referred to above, SCC flat out admitted that it does not (and cannot) interconnect under section 251(c)(2) of the Act. SCC said, "The provisions governing interconnection under the FTA are inapplicable to SCC; therefore, SCC does not seek to 'interconnect' under § 251(c)." Exhibit 4, at 13. *See also id.* at 4 ("SCC is not claiming rights to interconnect under § 251 of the FTA").

In its Illinois Application, SCC repeatedly states that it does not provide long distance toll services or local exchange dial tone services and does not intend to provide such services (*e.g.*, Exhibit 6 at 1, 2, 4) *and* that SCC "does not own, operate or maintain any local access lines" (*id.* at 8, 9). Thus, SCC does not provide, and by its own declaration will not provide, telephone exchange service or exchange access in Illinois. From that it necessarily follows that SCC is not seeking interconnection under the 1996 Act, and therefore that SCC is not entitled to arbitration under the 1996 Act.

IV. SCC'S PETITION SHOULD BE SUMMARILY DENIED SO THAT THE COMMISSION AND THE PARTIES DO NOT NEEDLESSLY SPEND TIME AND MONEY LITIGATING ISSUES THAT THE COMMISSION WILL HAVE NO OCCASION TO RESOLVE.

Because SCC is the Petitioner, it is SCC's burden to prove it is a telecommunications carrier, not Ameritech Illinois' burden to prove it is not. *E.g.*, *Del Vecchio v. Conseco, Inc.*, 230 F.3d 974, 979 (7th Cir. 2000) (the party invoking a tribunal's jurisdiction bears the burden of proving that the case is properly in that tribunal); *Enberg v. Park City Mobile Home, Inc.*, 1996 WL 120881 (Ill.C.C. March 23, 1994) (imposing on the complainant the burden to prove the facts that would bring the case within the Commission's jurisdiction). All the evidence available to Ameritech Illinois indicates that SCC is not a telecommunications carrier. Now, SCC will have an opportunity in its response to this motion to overcome that evidence and show that it is a telecommunications carrier, that is, that it does offer telecommunications services for a fee directly to the public. If SCC cannot make that showing, Ameritech Illinois strongly urges the Hearing Examiners to dismiss SCC's Petition *now*, rather than unnecessarily burdening the parties and the Commission with demanding litigation over the fifty issues that SCC has set forth in its Petition.

Indeed, while resolution of the issues set forth in SCC's Petition would do nothing to promote local exchange competition in Illinois – because SCC is not engaged in and will not be engaged in competition in the local exchange market – a prompt dismissal of the Petition would serve a pro-competitive purpose: It would enable SBC/Ameritech personnel who would otherwise be tied up in this proceeding (including, for example, interconnection negotiators and subject matter experts who work on interconnection negotiations and arbitrations) to devote their attention to interconnection arrangements with companies that *are* telecommunications carriers entitled to agreements under the 1996 Act. Negotiations under the Act (let alone arbitrations) are an extraordinarily demanding and time-consuming enterprise. SBC/Ameritech has devoted tens of thousands of person hours to such negotiations, and is currently in the process of negotiating approximately 1100 interconnection agreements throughout the SBC/Ameritech region. It ill serves the purposes of the 1996 Act to burden the process with additional negotiations and arbitrations with entities that do not meet the threshold requirement that Congress has established and that this Commission enforces.

Accordingly, Ameritech Illinois respectfully suggests that the Hearing Examiners proceed as follows:

1. Set a tight, but not unreasonable, schedule for further briefing on Ameritech Illinois' motion. Ameritech Illinois proposes that responses to the motion be due in hand on December 20, 2000, and that Ameritech Illinois' reply be due in hand on December 22, 2000.

2. Defer the due date for Ameritech Illinois' Response to the Petition from December 29, 2000, until after Ameritech Illinois' Motion to Dismiss has been decided. In normal litigation, a defendant is not required to answer a complaint until after its motion to dismiss has been decided, and there is nothing to be said here for requiring Ameritech Illinois to

undertake the work necessary to prepare its response while this obviously substantial motion to dismiss is pending. Under section 252(b)(3) of the 1996 Act, responses to arbitration petitions are optional. Consequently, it would be permissible for the Commission to receive Ameritech Illinois' response more than 25 days after the Commission received the Petition. (To the extent that Ameritech Illinois may wish to set forth any issues for arbitration in addition to those set forth in SCC's Petition, however, Ameritech Illinois will do by December 29, 2000.)

3. Ameritech Illinois recognizes that even if the Hearing Examiners are disposed to dismiss SCC's Petition, they may be reluctant to do so at this stage of the proceedings out of concern that if the Commission were to disapprove the dismissal, the schedule for this proceeding will have been thrown off track. That concern, while understandable, would be an unfortunate reason for going forward with demanding and time-consuming proceedings that will in all probability come to naught. Ameritech Illinois therefore suggests that if the Hearing Examiners are favorably disposed to Ameritech Illinois' motion, the Hearing Examiners solicit the parties' agreement to extend the date by which the Commission must conclude this proceeding, so as to allow time for a final Commission decision on the motion to dismiss before proceeding with the merits. Such extensions of section 252(b) arbitrations are not uncommon, and do not lead to FCC preemption under section 252(e)(5) of the 1996 Act or to any other untoward consequence.

CONCLUSION

For the foregoing reasons, Ameritech Illinois respectfully urges the Commission to proceed as proposed above and to dismiss SCC's request for arbitration.

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Respectfully submitted,

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